Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Karen M. Deleon and Carlos Deleon,

Plaintiffs,

-against-

Luis A. Velasquez and
Transportes El Universal, Inc.

Defendants.

Motion Sequence No.: 001; MG; CD
Motion Date: 10/27/16
Submitted: 3/22/17

Index No.: 31856/2013

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Clerk of the Court

Upon the following papers numbered 1 to 25 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 9; Answering Affidavits and supporting papers, 10 - 23; Replying Affidavits and supporting papers, 24 - 25; it is

ORDERED that this motion by defendants, Luis A. Velasquez and Transportes el Universal, Inc., for an order awarding summary judgment in their favor dismissing the complaint of plaintiff on the ground that the plaintiff, Karen M. Deleon, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is granted, and the complaint is hereby dismissed.

Plaintiffs Karen M. Deleon and Carlos Deleon commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident that occurred on January 16, 2011. By stipulation dated July 26, 2016, the claims asserted by Carlos Deleon were

discontinued. Defendants now move for summary judgment dismissing the complaint, alleging that Insurance Law §5104 precludes plaintiff Karen M. Deleon from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law §5102(d). It is alleged in the bill of particulars that plaintiff sustained an "activation" of right-sided disc bulges at C5-6 and C6-7, and an "activation" of a right-sided disc bulge at L5-S1 with thecal sac impingement, and other soft tissue injuries. In support of the motion, defendant submitted numerous documents, including the deposition of plaintiff Karen M. Deleon, in which she testified that she attended a "sweet 16 event" after the accident. It was also plaintiff's testimony that she could not recall the first time that she sought medical treatment after the accident but that she believed it was with a chiropractor, Dr. Plutno, "maybe a week within the accident." Plaintiff was not employed on the date of the deposition in February 2016, and she testified that she could not recall if she was employed on the day of the accident. She testified that after the accident she was confined to bed and home for "[m]aybe a week or two."

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Insurance Law §5102(d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (*see* ***Beltran v Powow Limo, Inc.***, *supra*; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McIntosh v O'Brien***, 69 AD3d 585, 893 NYS2d 154 [2d Dept 2010]). Once a defendant meets this burden, the plaintiff must present proof,

in admissible form, which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). A plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*).

In support of the motion, defendants submitted the affirmed medical report of Edward M. Weiland, M.D., a neurologist, who examined Karen M. Deleon on March 24, 2016. At the time of the examination, plaintiff complained of "neck pain radiating more prevalently into the area of her right shoulder." Examination of the cervical spine revealed flexion, extension, right and left lateral rotation and right and left lateral flexion, as measured with a goniometer, were full. The foraminal compression test, shoulder depressor test, Soto-Hall test and Valsalva's maneuver were negative. Flexion, extension, right and left lateral flexion of the lumbar spine were full, and Babinski's, Waddell test and Fabere-Patrick sign were negative. Straight leg raising was unlimited at 90 degrees. Sensation was intact and deep tendon reflexes were normal. Dr. Weiland concluded that any alleged injuries sustained by the plaintiff had resolved and there was no evidence of any residual or permanent neurological injury.

Defendants also submitted the affirmed report of radiologist Audrey Eisenstadt, M.D., who reviewed the radiograph of plaintiff's cervical spine taken on February 28, 2011, which showed a straightening of the cervical lordosis but no fracture. Dr. Eisenstadt also reviewed the MRI scan of the cervical spine taken on March 9, 2011 which showed desiccation of C2-3 through C7-T1 invertebral disc levels and bulging at C5-6 and C6-7, but no focal disc herniations or annular tears. The doctor concluded that the disc desiccation is a degenerative process with no traumatic etiology, and there was no evidence of traumatic bony or intervertebral disc changes. Dr. Eisenstadt also reviewed a radiograph of the lumbar spine taken on February 28, 2011 as well as an MRI scan taken on March 17, 2011. The radiograph showed narrowing of the disc space at L5-S1, which the doctor opined was degenerative and predated the underlying accident. The MRI showed bulging of the L4-5 intervertebral disc level as well as a right paracentral L5-S1 disc herniation that impressed on the

right side of the thecal sac, which the doctor opined was degenerative in etiology. No osseous contusion or annular tear was seen.

Defendants' submissions establish a *prima facie* case that the alleged injuries to plaintiff's spinal regions do not constitute "serious injuries" within the meaning of Insurance Law §5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

In opposition to the motion, plaintiff submitted multiple documents, including her own affidavit as well as the affirmation of Luis M. Fandos, M.D., who first examined plaintiff on April 20, 2016. At that time, the doctor reported found positive Spurling's on the right side with tenderness on palpation of the cervical paraspinal muscles on the right side. There is report of any range of motion testing having been undertaken at the visit. Plaintiff was seen multiple times thereafter and was given cervical epidural steroid injections as well as trigger point injections in the lumbar paraspinal muscles. On October 7, 2016, plaintiff underwent cervical intra-articular facet injections at right C5-6 and C6-7 levels under anesthesia. It was the doctor's conclusion that plaintiff "sustained causally related injuries with resultant sequelae from the motor vehicle accident of January 16, 2011 to her cervical and lumbar spines, and left shoulder . . . [that] have resulted in significant limitation and permanent partial disability."

Plaintiff also submitted the affirmed reports of the cervical MRI taken on March 10, 2011 and the lumbar MRI taken on March 18, 2011, as well as affirmed reports of the cervical MRI taken on April 10, 2015 and MRI of the right shoulder taken on April 10, 2015. The affirmed report of an MRI of the cervical spine taken on November 3, 2015 was also submitted, as were the affirmed reports of an MRI of the cervical spine taken on August 18, 2016 and an MRI of the lumbar spine taken on October 12, 2016. While the plaintiff also submitted copies of records for visits with the chiropractor from January 2011 through June 2011, and a report from her treating chiropractor, they were not notarized and not in admissible form (see ***Wiley v Hannon,*** 194 AD2d 722, 601 NYS2d 805 [2d Dept 1993]).

Plaintiff failed to submit competent medical evidence that as a result of injuries sustained in the accident, she was prevented from performing her usual and customary activities for 90 out of the first 180 days following the accident (*see* ***Pompey v Carney,*** 59 AD3d 416, 872 NYS2d 541 [2d Dept 2009]). Furthermore, plaintiff failed to present competent medical evidence that revealed the existence of significant limitations contemporaneous with the underlying accident, and she did not raise a triable issue of fact as to whether she sustained a permanent consequential limitation of use or significant limitation of use (*see* ***Catalano v Kopmann,*** 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]). In addition, plaintiff's treating doctor failed to address the findings of defendants' experts that the plaintiff has degenerative disc disease in her spine that was not caused by the subject accident (*see* ***John v Linden,*** 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]). In addition, the affirmed MRI reports submitted by plaintiff did not set forth the doctor's opinions on the cause of the findings stated in those reports (*see* ***John v Linden,*** *id.*). Having failed to address the evidence submitted by defendants that the MRI findings relative to plaintiff's spine are degenerative in nature

and unrelated to the subject accident, any conclusions by the plaintiff's doctors that the injuries and alleged limitations were the result of the subject accident are speculative and fail to raise a triable issue of fact (*see* ***Larson v Delgado,*** 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment is granted.

Dated: June 13, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION